

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARCELLE HAYDEN ROSS (formerly HAYDEN))

Claimant)

VS.)

THE BOEING COMPANY)

Respondent)

AND)

**AMERICAN MANUFACTURERS MUTUAL
INSURANCE**)

Insurance Carrier)

Docket No. 231,706

ORDER

Respondent and its insurance carrier appealed the November 26, 2001 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 21, 2002, in Topeka, Kansas.

APPEARANCES

James R. Shetlar of Overland Park, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the transcript from the April 26, 2001 preliminary hearing. At oral argument before the Board, the parties agreed the value of claimant's additional compensation items equaled \$149.09. Accordingly, claimant's average weekly wage is \$1,022.96 when those items are included.

ISSUES

This is a claim for a November 22, 1996 accident, which the parties stipulated arose out of and in the course of employment with respondent. In the November 26, 2001 Award, Judge Barnes determined claimant sustained a 72.5 percent task loss and a 58.5

percent wage loss as a result of the accident. Consequently, the Judge awarded claimant a 65.5 percent permanent partial general disability.

In determining claimant's task loss, the Judge averaged a 62 percent task loss percentage (from Dr. Steven J. Howell) with an 83 percent task loss percentage (from Dr. Pedro A. Murati). In determining claimant's wage loss, the Judge, in effect, imputed a post-injury wage of \$511.21 per week, and compared that wage to a pre-injury wage of \$873.87 per week.

On this appeal the respondent and its insurance carrier request the Board to review the nature and extent of claimant's injury and disability. That is the only issue before the Board on this review.

Claimant contends she sustained permanent injuries to both feet, both legs and her low back as a direct consequence of the November 1996 accident. Based upon the ratings provided by Dr. Pedro A. Murati, claimant contends she has sustained an 18 percent whole person functional impairment. In her brief to the Board, claimant argues that her award should be increased as the permanent partial general disability should be calculated using a 100 percent wage loss.

Conversely, respondent and its insurance carrier contend claimant has sustained functional impairment to the right foot only and, therefore, the award should be limited to a K.S.A. 1996 Supp. 44-510d scheduled injury to the right lower leg. Respondent and its insurance carrier argue the stress fracture in claimant's left foot healed, leaving neither permanent injury nor impairment. Moreover, respondent and its insurance carrier contend claimant did not develop a back injury as a consequence of the November 1996 accident as Dr. Howell's records fail to note that claimant made any back complaints during the three years that the doctor treated her feet. Accordingly, respondent and its insurance carrier request the Board to reduce the permanent disability benefits awarded.

In the alternative, respondent and its insurance carrier request the Board to adopt the opinions from their vocational rehabilitation counselor, Karen Crist Terrill, regarding claimant's task loss and claimant's loss of ability to earn wages.

FINDINGS OF FACT

After reviewing the entire record, the Board finds, as follows:

1. On November 22, 1996, claimant fell approximately 11 feet as she attempted to climb down from the wheel of an airplane. Claimant landed on both feet on the concrete floor but her feet gave way and she fell backwards, striking her head on scaffolding and

ending on her back. Paramedics came, braced claimant's legs and neck, and carried her on a body board to the medical department.

2. Shortly after the accident, respondent's insurance carrier referred claimant to Dr. Steven J. Howell, an orthopedic surgeon who specializes in treating the lower extremities. Claimant treated with Dr. Howell from November 26, 1996, through December 14, 1999. At their first visit, the doctor diagnosed a severely fractured calcaneus in the right foot. In early December 1996, the doctor operated on claimant's right heel, using metal devices to stabilize the fractured bone.

3. During claimant's hospital stay for the right heel surgery, claimant began complaining of left heel pain. A bone scan revealed a non-displaced stress fracture in the left heel, which Dr. Howell believed was probably due to claimant protecting the injured right foot.

4. Shortly after the accident, claimant also began experiencing pain in both hips and her low back. Claimant sought treatment at Dopps Chiropractic Clinic. The chiropractor's itemized statement that was entered into evidence indicates claimant saw the chiropractor approximately 138 times from August 1997 through the last visit in July 2000. Any visits claimant had with the chiropractor between February 1997 and August 1997 are not itemized on the statement. Claimant attributes her hip and low back symptoms to no longer walking straight.

5. In February 1998, Dr. Howell released claimant from his care, as the doctor believed claimant had reached maximum medical improvement. At that time, the doctor gave claimant permanent work restrictions limiting both standing and walking to no more than two hours per day.

6. Following the release from Dr. Howell, claimant returned to work for respondent with accommodations. In June 1998, after placing claimant in various jobs, respondent transferred claimant from an hourly to a salaried position, which required minimal physical activity as she sat at a desk handling paperwork. That transfer, however, cost claimant both money and her union membership. Claimant began paying more for health insurance but, more importantly, claimant lost her union membership and seniority rights.

7. In September 1998, claimant returned to Dr. Howell complaining of pain around her right ankle. The doctor injected the right ankle with steroids, which provided substantial relief. But the right ankle pain eventually returned and in January 1999, the doctor again operated on claimant's right ankle, removing a loose piece of bone and reconstructing the ankle. At follow-up visits with the doctor in March, June and December 1999, claimant reported improved pain.

8. On approximately June 18, 1999, claimant was laid off. Because she had lost her seniority rights, claimant was unable to bid into another job. Claimant, however, received a severance package based upon longevity that paid her a salary through November 22, 1999. Following the June 1999 layoff, claimant began searching for a job.

9. In December 1999, Dr. Howell again released claimant from his care, limiting her to sedentary work. Moreover, the doctor rated claimant as having a 15 percent functional impairment to the right lower extremity due to the fractured heel and a five percent functional impairment due to the ankle surgery. In all, the doctor rated claimant's right lower extremity functional impairment at 20 percent.

10. In late July 2000, claimant and her husband moved to Florida. Shortly afterwards, in August 2000, claimant began attending school full-time at Lake Sumpter Community College in Leesburg, Florida, seeking a degree in computer technology. But in late 2000, claimant lost her educational grant. Consequently, claimant has not attended school since December 2000.

11. Judge Barnes conducted a regular hearing in this claim in October 2000. At that time, claimant had ongoing pain in her right heel, pain in her right ankle, cramping in her toes and in her calf in the right leg, pain in the right arch, left heel pain and symptoms in her low back and hip.

12. In April 2001, claimant appeared by telephone before Judge Barnes during a preliminary hearing, requesting permission to see a Florida physician for authorized medical treatment. At that time, claimant had increased right heel and ankle symptoms for which she had recently sought treatment at a Florida medical center where she was given a prescription for swelling and was told to see a specialist.

13. At the October 2000 regular hearing, claimant introduced a list of potential employers that she had contacted between June 28, 1999, and July 21, 2000. Claimant made approximately 113 contacts with potential employers during that period of time. According to claimant, as part of her job search she has sent a resume to every aircraft company that she could find, as she was willing to relocate. Immediately after moving to Florida, claimant spent the first month every day in the state's career center doing a job search. And claimant even continued to look for work after she began attending classes and had spoken with her instructors about attending classes at night, if necessary.

14. In attempting to establish the extent of claimant's injuries, claimant presented Dr. Pedro A. Murati's testimony. Dr. Murati is board-certified in physical medicine and rehabilitation and is also board-certified in electrodiagnostic medicine and as an independent medical examiner. The doctor saw claimant at her attorney's request in both May 1998 and again in March 2000.

15. Dr. Murati diagnosed status post right open reduction, internal fixation calcaneal fracture and ankle reconstruction, status post left calcaneal fracture, right sacroiliac joint dysfunction, bilateral trochanteric bursitis and lower lumbar strain due to an abnormal gait. Based on that diagnosis, the doctor concluded claimant had an 18 percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor determined claimant should perform only sedentary work, walk only occasionally and never walk more than 20 minutes at a time.

16. According to Dr. Murati's reports, at their May 1998 meeting claimant had aching pain with numbness in both heels, pain in her hips and occasional low back pain. But at the March 2000 examination, claimant reported pain mainly in her right ankle, occasional left ankle pain, pain in the right calf and right hip, and low back pain that radiated into the right hip.

17. At his deposition, Dr. Murati reviewed a list, which was prepared by vocational counselor Michael J. Dreiling, of work tasks that claimant performed in the 15-year period before the November 1996 accident. According to Dr. Murati, claimant is now unable to perform 10 of the 12 itemized tasks, or approximately 83 percent.

18. To counter Dr. Murati's testimony, respondent and its insurance carrier presented Dr. Howell's testimony. Dr. Howell is a board-certified orthopedic surgeon who limits his practice to the lower extremities. Dr. Howell treated claimant for approximately three years, seeing her approximately 20 times, including their last visit in December 1999.

19. As indicated above, Dr. Howell rated claimant's right lower extremity at 20 percent. But the doctor did not believe the left lower extremity warranted a permanent functional impairment rating as the left foot non-displaced fracture was only temporary as the fracture healed, leaving no permanent injury. In arriving at that conclusion, the doctor considered a November 1997 x-ray of the left foot that showed the fracture had completely healed. There is no indication in the record that Dr. Howell examined claimant's back to determine if she had any permanent impairment due to back problems.

20. Regarding claimant's complaints of ongoing left foot pain, Dr. Howell stated:

Well, if there's been -- well, it's extremely common if you have an injury to one part of your body you have to walk more on that other side that it will hurt because of that. Now -- and I'm making the assumption that she did have a fracture of the [left] heel and I think it's a stress fracture because the CT scan did not show any sign of cracking within the bone and -- but that healed up. Now that still doesn't mean that she might not have [left] heel pain because she has to walk more on that side. Now in my opinion, part of the rating that is given for a body part is implied that the person does have an impairment to their body and if you're -- that is sort of wrapped

up in that is the idea that the other side might hurt because it has to take more stress. Now, you can make the assumption then that everybody who has an isolated foot injury on one side and complains of pain on the other side down the road because they have to walk a little bit awkwardly and more on the one side is entitled to a rating because that normal foot still hurts because it's seeing more pressure, but that's not what the law states and so, therefore, I don't feel that there is a rating on the left side, and the rating I gave on the right side I think is reasonable based on the Fourth Edition Guides to the table. **In fact I feel like I gave her a little extra, maybe a percentage extra that would encompass what I feel like any residual on the left side should be.**¹ (Emphasis added.)

Accordingly, Dr. Howell recognizes that claimant has ongoing symptoms in her left foot due to the right foot injury.

21. According to Dr. Howell, claimant continues to have difficulty walking and will continue to have problems, which may require additional medical treatment. As of December 2000, the doctor had claimant wearing a type of Velcro brace to help with the stability in the right foot and ankle.

22. Dr. Howell reviewed a task list, which was prepared by Karen Crist Terrill, of the work tasks that claimant had performed in the 15 years before the November 1996 accident. The doctor indicated that claimant should not perform 26 of the 42 itemized tasks. Accordingly, Dr. Howell believes claimant has lost the ability to perform approximately 62 percent of her former work tasks due to the right foot injury.

23. Two vocational experts provided their opinions. Michael J. Dreiling, who was hired by claimant's attorney, concluded claimant retained the potential to earn up to eight dollars per hour in the open labor market. Mr. Dreiling also indicated that he believed claimant had made a good faith effort to find appropriate employment and that it was appropriate for claimant to attend classes to upgrade her work skills when she found that she was unable to find work. On the other hand, Karen Crist Terrill, who was hired by respondent and its insurance carrier, concluded claimant retained the ability to earn between eight and ten dollars in the open labor market.

24. After carefully considering the entire record, the Board finds and concludes that claimant has sustained permanent injury to both feet and her back due to the November 1996 accident. That finding is based upon claimant's testimony regarding ongoing symptoms in both feet and back, the medical billing from Dr. Dopps that indicates extensive back treatment, Dr. Howell's acknowledgment of residual left foot problems due to the right foot injury, and Dr. Murati's testimony. Additionally, the Board notes that Dr. Murati's

¹ Howell Depo. at 45-47.

testimony regarding claimant's permanent impairment from the back is uncontradicted as no other doctor addressed that part of the body. The Board adopts Dr. Murati's whole person functional impairment rating as that is the only opinion in the record that rates both the lower extremity and back injuries. Accordingly, the Board finds claimant has sustained an 18 percent whole person functional impairment as a direct result of the November 1996 accident.

CONCLUSIONS OF LAW

The Board concludes the November 26, 2001 Award should be modified to increase claimant's permanent partial general disability from 65.5 percent to 86.25 percent.

Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*² and *Copeland*.³ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁴

According to the permanent partial general disability formula, claimant had an 18 percent permanent partial general disability up to the date of her layoff as she continued to earn wages that were at least 90 percent of her pre-injury average weekly wage.

But commencing with claimant's layoff on approximately June 18, 1999, claimant's wage loss increased to 100 percent. As required by *Copeland*, the Board has considered claimant's efforts in attempting to find other work and the Board concludes that she has made a good faith effort. The Board also finds under these facts that claimant's going to school to become more employable for jobs within her restrictions demonstrated good faith. Consequently, the actual 100 percent wage loss should be used in calculating claimant's permanent partial general disability for the period commencing June 18, 1999.

The Board affirms the Judge's finding that claimant has sustained a 72.5 percent task loss. Accordingly, averaging the 72.5 percent task loss with the 100 percent wage loss yields an 86.25 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the November 26, 2001 Award entered by Judge Barnes and increases claimant's permanent partial general disability from 65.5 percent to 86.25 percent.

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ *Id.* at 320.

**MARCELLE HAYDEN ROSS
(formerly HAYDEN)**

DOCKET NO. 231,706

Marcelle Hayden Ross (formerly Hayden) is granted compensation from The Boeing Company and its insurance carrier for a November 22, 1996 accident and resulting disability. Ms. Hayden Ross is entitled to receive 21.57 weeks of temporary total disability benefits at \$338 per week, or \$7,290.66.

For the period ending June 17, 1999, Ms. Hayden Ross is entitled to receive 73.52 weeks of permanent partial general disability benefits at \$338 per week, or \$24,849.76, for an 18 percent permanent partial general disability.

For the period commencing June 18, 1999, Ms. Hayden Ross is entitled to receive 200.77 weeks of permanent partial general disability benefits at \$338 per week, or \$67,859.58, for an 86.25 percent permanent partial general disability, making a total award not to exceed \$100,000.

As of February 10, 2003, there is due and owing to Ms. Hayden Ross 21.57 weeks of temporary total disability compensation at \$338 per week in the sum of \$7,290.66, plus 264.09 weeks of permanent partial general disability compensation at \$338 per week in the sum of \$89,262.42, for a total due and owing of \$96,553.08, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$3,446.92 shall be paid at \$338 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation